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INTERGOVERNMENTAL NEGOTIATING COMMITTEE
FOR THE ELABORATION OF AN INTERNATIONAL
CONVENTION TO COMBAT DESERTIFICATION
IN THOSE COUNTRIES EXPERIENCING SERIOUS
DROUGHT AND/OR DESERTIFICATION, PARTICULARLY
IN AFRICA
Eighth session
Geneva, 5-16 February 1996
Agenda item 2

PROCEDURES TO RESOLVE QUESTIONS ON IMPLEMENTATION

I. Introduction

1. In paragraph 5 of its resolution 6/1 entitled "organization and programme of work for the interim period" (see document A/50/74, Appendix II), adopted at its sixth session, the Committee requested the Secretariat to prepare documentation on "procedures to resolve questions on implementation" for the eighth session. The present note responds to that request.

2. The following sections provide (a) background information on this item, including a brief review of precedents, (b) a preliminary list of relevant considerations, (c) comments on the timetable for adoption of the procedures and institutional mechanisms required by article 27 of the Convention, and (d) a list of possible options for future steps by the Committee.

II. Background

3. Article 27 of the Convention provides that:

> "The Conference of the Parties shall consider and adopt procedures and institutional mechanisms for the resolution of questions that may arise with regard to the implementation of the Convention."

4. Such provisions are a relatively new feature of environmental conventions. They stem from a desire to emphasize cooperation and consultation in the implementation of conventions which have a global significance, in light of the perceived general interest in their effective implementation. They are intended to provide a more effective and timely alternative to traditional dispute settlement mechanisms, emphasizing prevention as opposed to corrective measures *ex post facto*.

5. While their drafting differs, as they are adapted to the subject-matter of each convention, these provisions share a common philosophy and objective. That is to provide an avenue that enables Parties to a convention to discuss its implementation in a constructive and cooperative way and, thus, resolve potential differences of views before they reach the stage of full fledged disputes. They may also lead to measures to assist a Party which experiences difficulties in complying with its obligations. These provisions, therefore, represent a cooperative and preventive approach aiming at securing amicable solutions to matters relating to the implementation of treaty obligations, as opposed to the more confrontational nature of dispute settlement provisions.

6. The most relevant precedents incorporating a provision of this nature include the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol) and the United Nations Framework Convention on Climate Change. Like article 27 of the Convention to Combat Desertification, article 8 of the Montreal Protocol provides that the Parties shall consider and approve "procedures and institutional mechanisms..." However, it should be noted that the wording otherwise differs somewhat: in the case of the Montreal Protocol, the purpose is "for determining non compliance" while that of the Convention to Combat Desertification is "for the resolution of questions that may arise with regard to the implementation of the Convention."

7. The procedure of the Montreal Protocol was adopted at the Fourth Meeting of the Parties to the Protocol. It is based on four fundamental principles: the regime should avoid complexity, should avoid confrontation, should be transparent, and should leave the taking of decisions to the Meeting of the Parties. The main principles of the regime of the Second Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions (Oslo Sulphur Protocol) are similar to those of the Montreal Protocol.

8. Article 13 of the Convention on Climate Change provides that the Conference of the Parties (COP) shall, at its first session, consider "the establishment of a multilateral consultative process, available to Parties on their request, for the resolution of questions regarding the implementation of the Convention." Delegates will note that this provision refers to a "process" while the Convention to Combat Desertification refers to "procedures and institutional mechanisms."

9. The Conference of the Parties of the Climate Change Convention has not yet adopted the multilateral consultative process required by article 13 of that Convention. At its first session, the COP established an open ended *ad hoc* working group of technical and legal experts "to study all issues relating to the establishment of a multilateral consultative process and its design." The *ad hoc*

working group held a preliminary meeting in November 1995. The working group agreed on a questionaire, which has been submitted to the Parties for comments. Replies will be collated and synthetised for consideration by the working group, in July 1996.

10. In the course of its preparatory work, the Climate Change Secretariat has prepared a detailed analysis of the procedures and institutional mechanisms under the Montreal Protocol, the Oslo Sulphur Protocol, as well as of other precedents. Copies of this document (FCCC/CP/1995/Misc.2) will be made available to interested delegates at the eighth session as it could serve as background material for an initial discussion in the Committee on this issue.

11. However, precedents must be examined with caution. As noted above, the actual wording of the provisions differs somewhat. In addition, the procedures and institutional mechanisms must be adapted to the nature and characteristics of each convention. Since the subject-matter differs significantly from one convention to another, different procedures and mechanisms may be required. Furthermore, the institutions established under each convention vary. This may have an impact on the concrete procedures and mechanisms required to implement the procedures and mechanisms envisaged. For these reasons, precedents might prove to be of limited value in implementing article 27 of the Convention and new avenues may have to be explored.

III. Relevant considerations

12. The elaboration and adoption of procedures and institutional mechanisms for the resolution of questions on implementation raises a number of preliminary questions, which will have to be addressed by Working Group II or possibly another mechanism chosen to carry out the preparatory work on this issue. These basic questions include the following:

(a) What is the relationship between the procedures and institutional mechanisms pursuant to article 27 and the review of implementation by the COP pursuant to article 22, as well as the related provisions on communication of information pursuant to article 26?

(b) What is the relationship between the procedures and institutional mechanisms of article 27 and the dispute settlement procedures provided for under article 28? Are they mutually exclusive? Should recourse to the procedures under one article prevent, while it is being pursued, any recourse under the other?

(c) What should be the scope of such procedures and mechanisms? On other words, what types of questions could be raised under the procedures and institutional mechanisms pursuant to article 27?

(d) What principles should govern the procedures and institutional mechanisms of article 27? Should they be similar to those of the regime under the Montreal Protocol?

(e) What would be the exact nature and composition of the institutional mechanisms contemplated under aticle 27? Should participation in them be restricted to representatives of Parties or should there be a role for experts appointed on an personal basis?

(f) Which entities may have recourse to article 27? A Party alone, several Parties acting together? Intergovernmental organizations? Non-governmental organizations?

(g) Should the procedures and mechanisms be public and open ended or private? What should be the degree of transparency and flexibility?

(h) At what point in time and under what conditions can a Party trigger the application of the procedures and institutional mechanisms pursuant to article 27?

(i) What would be the timeframe of application of such procedures and mechanims from the time they are triggered to the time conclusions are reached?

(j) What would be the modalities by which such procedures and mechanisms arrived at their conclusions? What would be the nature of their various phases?

(k) What would be the legal effect, if any, of the conclusions of such procedures and mechanisms?

(l) By what legal means would the procedures and institutional mechanisms be adopted?

IV. Timetable for action

13. While the Convention requires the adoption of procedures and institutional mechanisms for the resolution of questions that may arise with regard to the implementation of the Convention, it does not specify the exact timing of their adoption. Thus, while it may be desirable to adopt such procedures and mechanims at an early stage after the entry into force of the Convention, there may also be considerations favoring delay of such adoption until more experience in Convention implementation is gained. The Committee may wish to examine this matter with a view to determining the best approach as regards the timing of the work on this matter, taking into account all relevant circumstances.

V. Future steps

14. Before initiating a discussion on the substance of this item, the members of Working Group II may wish to engage in a preliminary discussion to determine the manner in which this agenda item might best be addressed. Depending on the degree

of priority to be afforded to this item and taking into account the workload during the interim period, several courses of action may be envisaged for future work on this issue. They include the following:

(a) postponing the initiation of discussion on this matter until the first session of the Conference of the Parties;

(b) inviting Committee members to communicate their views in writing to the Secretariat by an agreed date and requesting the Secretariat to compile these views for the ninth session, or another future INCD session;

(c) establishing an *ad hoc* committee of legal experts to review this matter and report to Working Group II at an agreed date;

(d) pursuing a combination of (b) and (c), in which case the *ad hoc* committee of experts could be established as early as the ninth session or at a later time, including possibly by the COP.